DUNLOP (M) INDUSTRIES BHD.

v.

PERNAS-SIME DARBY SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[CIVIL SUIT NO. C 94 OF 1983]
12 MARCH 1983

CIVIL PROCEDURE: *Interlocutory injunction - Whether serious questions to be tried - Abandonment or waiver of contract - Effect of ruling of Ministry of Trade and Industry - Adequacy of damages - Balance of convenience - Suppression of facts - Construction - Conflict between two clauses.*

CONTRACT: *Construction - Stipulation as to time - Whether regarding acceptance or completion - Waiver - Contravention of terms of issue of licence - Illegality.*

IT International Sendirian Berhad was a joint venture private company, its members being the 2nd, 3rd, 4th and 6th defendants and the plaintiff, formed after the plaintiff had obtained a manufacturing licence issued to IT International, not yet formed at the time of issue. The 3rd defendant, desiring to sell its shares, offered them to the 6th defendant, stating that the offer was valid for 30 days from the date of the letter. The plaintiff objected to this claiming that the offer must first be made to the other partners as required in the joint venture agreement. As a result of a board meeting of IT International, the 2nd, 3rd and 4th defendants offered their shares to the plaintiff, on the same terms and conditions as the offer initially made to the 6th defendant, except that the period mentioned was 100 days instead of 30 days. A subsequent clause required the option to be exercised within 60 days. The offer was also subject to approval being obtained from the Ministry of Trade and Industry. All the offers' were accepted within less than 60 days but the plaintiff had yet to obtain Ministry approval for the purchase of the shares. The plaintiff applied for an interlocutory injunction pending the trial of a suit brought by it against the defendants regarding the above offers.

Held:

[1] The stipulated period of 100 days was regarding the period for acceptance of the offer and not any period for completion by performance by the purchaser.

[2] Whether the period stipulated was 100 days or 60 days, it was not of any significance, as the offer had been accepted within either period. As a matter of construction anyway, the earlier clause would have prevailed. [*Forbes v. Git* [1922] 1 AC 256 at 259].

[3] The contract had not yet expired. As time was not the essence, the contracts could be performed within a reasonable time.

[4] There were serious questions to be tried as to whether the plaintiff had abandoned or waived its right to enforce the contracts and also whether it was bound by the ruling of the Ministry regarding a condition of the manufacturing licence issue under the Industrial Co-ordination Act granted to IT International and the validity of the acceptance of the offers by the plaintiff, which ruling was made in ignorance and misapprehension of certain facts and circumstances.

[5] Until the plaintiff had been refused approval by the Ministry, it was premature to declare the contracts void for illegality for circumventing the conditions of the manufacturing licence.

[6] Damages would not provide an adequate remedy for the plaintiff in the event of it succeeding at the trial, as, if an injunction was not granted, the loss to the plaintiff would be greater than if it was granted. [*American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 at 408 G].

[7] The balance of convenience lay in favour of the granting of the interlocutory injunction, and there was no suppression of facts.

[Order for injunction is continued until trial or further order. Costs in the cause.]

Cases referred to:
Re Yenidje Tobacco Co. Ltd. [1916] 2 Ch 426
In re Westbourne Galleries Ltd. [1973] AC 360
Forbes v. Git [1922] 1 AC 256
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396

Other sources referrred to:
Odgers' Construction of Deeds and Statutes, 5th Edn., p. 72

For the plaintiff - Humfrey Ball; M/s. Humfrey Ball
For the 1st and 6th defendants - C.V. Das; M/s. Shook Lin & Bok
For the 2nd, 3rd and 4th defendants - Chan Hua Eng; M/s. Shearn Delamore & Co.
For the 5th defendant - K.K. Sng; M/s. Sng & Matthew

JUDGMENT

NH Chan J:

IT International Sendirian Berhad (the 5th defendant) is a joint venture private company. It may be convenient to describe the company as a *partnership*, not of individuals but of corporations, *carried on in the guise of a company*, an expression which was coined by Lord Cozens-Hardy MR in *Re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426, 429. Although it may be convenient to use such expressions as "quasi-partnership" or "partnership in the guise of a company" it may also be confusing. The words of Lord Wilberforce in *In re Westbourne Galleries Ltd.* [1973] AC 360 is particularly apposite as they serve to remind us of a fundamental distinction in company law. He said, at p. 380:

> But the expressions may be confusing if they obscure, or deny, the fact that the parties ... are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership ..." So long as we are mindful of the distinction and are not confused, we may conveniently refer to a joint venture company as a "partnership in the guise of a company" and the parties to the joint venture as "partners".

IT International was formed on 20 December, 1979. It is necessary here to mention certain events that are relevant, in chronological order, which have led to the formation of the company. It all started when Dunlop Malaysia Industries Berhad (the plaintiff) applied for a manufacturing licence issued under the Industrial Co-ordination Act, 1975 on behalf of IT International (then not yet in existence) at the instance of the promoters of the company. The application was made on 17 August 1978. On 20 October 1978, a reply was sent from the Ministry of Trade and Industry to the proposed IT International approving the issue of a manufacturing licence to the company. On 25 October 1978, the licence was issued to the proposed company.

On 13 December 1979, a joint venture agreement was entered into between Dunlop Malaysia (the plaintiff), Kedah State Development Corporation, Pernas-Sime Darby Sendirian Berhad (the 1st defendant), Lembaga Tabung Angkatan Tentera (the 2nd defendant), Koperasi Polis Di Raja Malaysia Berhad (the 3rd defendant) and Malaysian Rubber Development Corporation Berhad (the 4th defendant). Under the terms of the joint venture, the partners agree to form IT International for the purpose of establishing a joint venture industry for the manufacture of motorcycle, scooter, car (cross-ply only), truck (cross-ply only), light truck (cross-ply only) and bicycle tyres. The company would also do retreading of tyres and manufacture such other products as may be agreed upon between the parties to the joint venture.

On 20 December 1979, IT International attained corporate existence.

On 23 April 1980, a resolution was passed by the board of IT International substituting the name of Pernas Sime Darby Holdings Sendirian Berhad (the 6th defendant) in place of the name of the 1st defendant as it appears in all documents, agreements and certificates. The 1st defendant is a wholly owned subsidiary of Pernas-Sime Darby Holdings.

That in brief is a summary of the conception and birth of IT International.

At the outset, the hopes of the partners were high and they aspired for the joint venture company to succeed as a Bumiputra controlled company, supported by international technology and management skills of the highest level. It was hoped that the company would achieve a significant role in tyre manufacture so that it would become the third major tyre factory in Malaysia.

Unhappily things did not work out that way. The partners fell out. Hence the present litigation. The trouble began when the 3rd defendant on 10 August 1982, wrote to Pernas-Sime Darby Holdings offering to sell to it all of the 3rd defendant's 1,928,000 (later corrected to 2,192,000) ordinary shares in IT International. The letter is reproduced below:

> Koperasi Polis Diraja Malaysia Berhad
> 10 August 1982
>
> The Directors
> Pernas-Sime Darby Holdings Sdn. Bhd.
> 54 Jalan Ampang
> Kuala Lumpur
>
> Dear Sirs
>
> **IT International Sdn. Bhd.**
>
> We refer to the Extraordinary General Meeting of IT International Sdn. Bhd. held on Thursday, 5 August 1982 at which Koperasi Polis Diraja Malaysia Berhad waived its entitlement in the new rights issue in favour of your Company. The reasons for us not taking up our entitlement in the rights issue is due to an investment rationalisation being adopted by the Koperasi.
>
> In pursuance of this rationalisation, we have thought very seriously about our continued shareholding in IT International Sdn. Bhd. and have come to the conclusion that it would be better for us to disinvest in the Company. In view of this, the Koperasi Polis Diraja Malaysia Berhad hereby offers to Pernas-Sime Darby Holdings Sdn. Bhd. the sales of 1,928,000 ordinary shares of RM1 each in IT International Sdn. Bhd. on the following terms and conditions:
>
> (a) the consideration is RM1.05 per share payable in cash;
>
> (b) This offer is subject to approval being obtained from all relevant authorities;

(c) That upon the transfer in ownership of our shareholding to you, Pernas-Sime Darby Holdings Sdn. Bhd. will confirm its undertaking to comply with all the terms and conditions of the IT International Sdn. Bhd. Joint Venture Agreement dated 13 December 1979; and

(d) **This offer is valid for thirty (30) days from the date of this letter.** (My emphasis)

In making this offer to sell our shareholding we are assuming that the other shareholders of IT International Sdn. Bhd. will co-operate in the same manner in the recent rights issue by waiving their preemptive rights under the Joint Venture Agreement dated 13 December 1979 thereby enabling us to conclude the sale and purchase transaction in a smooth and expeditious manner.

In the interest of speed we are copying this letter to all shareholders to enable them to signify the agreement to the Secretary.

Please indicate to us early whether the offer is acceptable to you.

Yours faithfully
for KOPERASI POLIS DIRAJA MALAYSIA

Sgd.
(DATO' BORHAN BIN KUNTOM)
Chairman

cc:
Dunlop Malaysia Industries Berhad
4 Jalan Tandang
P O Box 66
Petaling Jaya
Selangor

It is pertinent at this stage to note a fact that will turn out to be of cardinal importance and significance later on and it is this: the offer contained in the letter is open for 30 days from the date of the letter. This condition can only relate to the acceptance of the offer. It can only mean that the offer has to be accepted within 30 days. It cannot form the basis for the view that completion should take effect within 30 days.

Then things started to stir up. On 14 August 1982, Dunlop Malaysia wrote to the 3rd defendant insisting that it must first offer the shares to the other partners as required in the joint venture agreement. Dunlop relied on the following clauses which read:

1.5 **Transfer of Shares**
Notwithstanding anything to the contrary contained in the Articles of Association of ITISB the parties hereto agree as follows:

1.5.1 No party hereto may transfer any shares in ITISB without offering such shares to the other parties on the following terms and conditions:

1.5.1.1 The party desiring to transfer (hereinafter called "the Transferor") any or all of its shares shall first offer in writing to sell such shares to the other member or members. The offer shall include a statement of its intention to transfer the name and address of the prospective transferee the number of shares involved and the price and other terms of the transfer:

Similar provisions are also to be found in the articles of IT International. Article 27A reads:

27A. Notwithstanding anything to the contrary contained in These Articles:

(i) No member may transfer any share in the Company without offering such share to the other members on the following terms and conditions:

(ii)(a) Any member desiring to transfer (hereinafter called "The Transferor") any or all of its shares shall first offer in writing to sell such shares to the other members. The offer shall include a statement of the Transferor's intention to transfer, the name and address of the prospective transferee, the number of shares involved, and the price and other terms of the transfer.

At a board meeting of IT International on 16 September 1982, the matter of Dunlop Malaysia's letter to the 3rd defendant insisting on compliance of the terms of the joint venture agreement was raised. This is what the minutes of the meeting say;

> Under any other business , Encik Shamsuddin bin Mahyuddin expressed his embarrassment over DMIB's wish to exercise its right under the Joint Venture Agreement to purchase the proportionate entitlement to the intended sale of 2,142,000 ordinary shares of KPDM at RM1.05 each to PSD.
>
> In his (Mr Moffett's) view, it was essential that the stipulated procedure for the sale of share equity be adhered to. Tunku Ahmad speaking through Encik Halim Dahlan for PSD indicated that it would be their wish that either DMIB or PSD acquired the major part of the shares becoming available for purchase. He did not see PSD being interested in remaining a minority shareholder. In these circumstances, the Chairman pointed out that all those wishing to sell their equity should make the offer in the stipulated manner as soon as convenient and speaking on behalf of MARDEC he said that he will so advise MARDEC.

As a result of what transpired at the meeting, the 3rd defendant on 23 September 1982, wrote to Dunlop Malaysia saying that it wished to sell all its shares in IT International to Pernas-Sime Darby Holdings, and that in accordance with the terms of the joint venture agreement, the 3rd defendant also would offer the same shares to Dunlop Malaysia. Similar letters were sent to Dunlop Malaysia by the 4th defendant on 28 September 1982, and the 2nd defendant on 12 October 1982. As all the letters are identical in terms, I need to read only one of them.

> 23 September 1982
>
> Dunlop Malaysia Industries Berhad
> 4 Jalan Tandang
> P O Box 66
> Petaling Jaya
>
> Dear Sirs
>
> **IT International Sdn. Bhd.**
>
> We wish to inform you that the KOPERASI POLIS DIRAJA MALAYSIA BERHAD which owns 2,142,000 shares of IT International wishes to sell these shares to Pernas Sime Darby Holdings Sdn. Bhd. on the following terms:
>
> (i) The consideration is RM1.05 per share payable in cash;
>
> (ii) The offer is subject to approval being obtained from relevant Malaysian authorities;
>
> (iii) Upon the transfer of ownership, the buyer will confirm in writing its undertaking to comply with all the terms and conditions of the IT International Sdn. Bhd. Joint Venture Agreement dated 13 December 1979;
>
> (iv) **The offer is valid for a period of 100 days beginning from today.** (My emphasis)
>
> In accordance with the procedure set out in Clause 1 of the Joint Venture Agreement dated 13 December 1979, **we hereby offer to sell to you such portion or all of our holdings of shares in IT International Sdn. Bhd. as you are entitled to under that Agreement on the same terms and conditions as are stated above.** (My emphasis)

In conformity with the requirements of Clause 1.5 of the Joint Venture Agreement we hereby state that:

(i) We intend, subject to the pre-emption procedure set out in that clause to transfer all of our holdings of 2,142,000 shares in IT International Sdn. Bhd. to Pernas Sime Darby Holdings Sdn. Bhd. whose address is at 54 Jalan Ampang, Kuala Lumpur.

(ii) The price is to be RM1.05 per share and the other terms of the transfer are as already stated above.

We would be grateful if you will let us know whether or not you wish to exercise the option to purchase these shares at an early date but in any case not later than 60 days from the date of this letter as provided in the Joint Venture Agreement. (My emphasis)

Yours faithfully
for KOPERASI POLIS DIRAJA MALAYSIA BERHAD

Sgd.
(SHAMSUDDIN BIN MAHYUDDIN)
Group General Manager

cc: Pernas Sime Darby Holdings Sdn. Bhd.

All the offers from the 3rd, 4th and 2nd defendants were accepted by Dunlop Malaysia on 18 November 1982, 25 November 1982, 9 December 1982, respectively.

I shall deal now with the first point of law raised by Counsel for the defendants. Both Mr. Das and Mr. Chan have urged on behalf of the defendants that these three contracts to purchase the shares of the 2nd, 3rd and 4th defendants have expired in that they have not been performed by Dunlop Malaysia within the time stipulated in the contracts. They urged that Dunlop Malaysia has yet to obtain governmental approval for the purchase of the shares and to pay for them. They submitted that all of those things must be done within 100 days from the date of the offer.

Counsel argued that the contracts must be performed within the 100-day period and since Dunlop Malaysia did not do so their contract with the 3rd defendant came to an end on 31 December 1982, the 4th defendant on 5 January 1983, and the 2nd defendant on 19 January 1983.

In all the three letters to Dunlop Malaysia offering to sell their shares, the 2nd, 3rd and 4th defendants have reiterated in these letters their offer to Pernas-Sime Darby Holdings. That offer was exactly on the same terms as the offer which the 3rd defendant had initially made to Pernas-Sime Darby Holdings on 10 August 1982, except that the period for acceptance of the offer is now 100 days instead of 30 days. The letter went on to say that they are now offering to sell to Dunlop Malaysia the shares which they have offered to Pernas-Sime Darby Holdings on the same terms and conditions as those that they have made to Pernas-Sime Darby Holdings. It is quite obvious from the terms of the letters, and it is my judgment, that if the offer can be accepted by Pernas-Sime Darby Holdings within 100 days, then, *a fortiori*, it is also open to Dunlop Malaysia to accept the same offer within the same period, as it has also been offered to Dunlop Malaysia on the same terms. It is impossible to read into the words of the offer the meaning that the period for completion by performance by the purchaser is limited to 100 days from the date of the offer.

The position would appear to be clear and unequivocal to anyone but for what seems to be an inconsistency that appears in the last paragraph of the letters of offer. It reads:

> We would be grateful if you will let us know whether or not you wish to exercise the option to purchase these shares at an early date but in any case not later than 60 days from the date of this letter as provided in the Joint Venture Agreement.

There is an old rule of construction which says that if two parts or clauses of a deed be repugnant, the first shall be received and the latter rejected. So if this rule is to be applied then, as in the instant case, if there are two periods of time allowed for acceptance appearing in the same offer, then as a matter of construction, the first period appearing in that document would prevail. "This seems to be a mere rule of thumb, totally unscientific and only to be resorted to when all else fails." [Odgers' Construction of Deeds and Statutes (5th Edn.), 72]. For myself I would prefer the language of Lord Wrenbury in *Forbes v. Git* [1922] 1 AC 256 at 259:

> If in a deed the earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. ... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.

However, all this has no great significance in the instant case because whether the offer was to be accepted within 100 days or 60 days, it had in fact been accepted within either period.

In my judgment, the contracts have not yet expired. Time not being the essence of the contracts, they could be performed within a reasonable time.

The next point of law that I have to consider is whether or not Dunlop Malaysia had abandoned or waived its legal right under the contracts. This submission came about in this way. There was a board meeting of IT international on 23 December 1982. At that meeting, the following discussion was said to have taken place. I read now from the minutes of that meeting:

> Encik Halim Dahlan then pointed out that DMIB's responses to take the proportion of the shares offered for sale by the three offeror companies had breached the condition 'c' of the Manufacturing Licence No. A000711 and put ITISB in jeopardy of losing its above licence.
>
> The Chairman pointed out that since his attention was drawn to Condition 'c' of the licence, he had written to the Ministry of Trade and Industry seeking clarification, but unfortunately had not received a reply as yet. After some further discussion, the Board agreed that it should be guided by the views of the Ministry and the following motion was dictated by the Chairman for consideration of the Board.
>
> > The Board agrees that the ruling of Ministry of Trade and Industry in relation to condition 'c' of the Manufacturing Licence should determine whether or not DMIB as presently constituted could acquire the shares offered. If the condition of the licence will be breached by the DMIB acquisition of the shares, the Board agrees that the DMIB acceptance may be considered to be null and void. Under these circumstances the acceptance of PSDH will be operative.
>
> Encik Halim Dahlan declared that such a delay in coming to a decision was unnecessary as it was very clear that DMIB acquisition of further shares would certainly breach condition 'c' of the licence. He wanted the Board to come to a decision on the matter immediately. The Chairman suggested that the proposal he had put forward was the only responsible way the Board could proceed and did not consider the time involved as representing 'inordinate delay' The Board agreed to the motion put forward by the Chairman.

Mr. Das submitted that Mr. Moffett of Dunlop Malaysia as a member of the board has agreed to the motion to refer the matter of Dunlop Malaysia's acquisition of the offered shares to the Ministry of Trade and Industry for a decision on whether that would contravene the conditions of the manufacturing licence. He said that the minutes of that meeting were tabled at the next meeting which was on 12 January 1983, and that they have been adopted except for the objection raised by Mr Moffett who said that his understanding was that the motion was not submitted for voting. This is what the minutes of the meeting of 12 January 1983, say:

> The Minutes of the Nineteenth Board Meeting held on 23 December 1982 were tabled before the meeting and time was allowed for reading thereof. Thereafter, the minutes were taken as read and adopted as a correct record of the proceedings. However, Mr. MJH Moffett protested and declared that his understanding was that the motion dictated by the Chairman was not submitted for voting.

The point that Mr. Das tried to make is this. If Mr. Moffett had agreed to the motion then he would have bound Dunlop Malaysia to accept the ruling of the Ministry. This is because Mr. Moffett represents Dunlop Malaysia on the board of IT International and can bind his principal in contract. On the other hand, if Mr. Moffett did not vote in favour of or voted against the motion then, he could not be said to have agreed to the motion and, therefore, could not have bound Dunlop Malaysia contractually even though the motion was carried by a majority.

Encik Halim Dahlan who represents Pernas-Sime Darby Holdings on the board of IT International said in his affidavit (dated 24 January 1982):

> 28. **... It has never been the practice at ITISB Board Meetings for resolutions to be formally voted upon. The practice** adopted throughout without any protest **was for resolutions to be** discussed by the Board and **unanimously adopted unless someone dissents in which event the decision is by a majority.** (My emphasis).

Yet in the same affidavit, Encik Halim deposed as follows:

> 33. At the said Meeting the Board approved the transfer of shares in favour of the Sixth Defendant. The Board also accepted the resignation of Tan Sri Dr. B.C. Sekhar as Chairman and my appointment to that post. It was also resolved to accept the resignation of Tan Sri Dr. B.C. Sekhar, Dato Borhan bin Kuntom and Major Gen. Dato' Pahlawan N. Selvarajah as Directors of the Board and the appointment in their place of Encik Abdul Rahman Ramli, Encik Hj Ahmad bin Sidek and Encik Mohd. bin Said as Directors. The plaintiffs' representative, Michael Moffett, **did not vote** on the resignations or appointments. (My emphasis).

There are also certain passages in the minutes of 12 January 1983, board meeting which would seem to suggest that there is a practice for voting on resolutions. See the last sentence of minute No. 4:

The Board agreed to this reference to the Ministry. **Mr. Moffett abstained from voting** on this decision. (My emphasis)

See also the second paragraph of minute No. 5:

> The following resolutions on the registrations and appointments of Directors were passed. However, **Mr. Moffett suggested he could not vote** for any of these resolutions since in his opinion the ITI was now not properly constituted. (My emphasis)

It is not possible at this juncture to say whether Dunlop Malaysia had abandoned or waived its right to enforce the contracts. Whether or not Mr. Moffett has agreed to the motion to refer to the Ministry for a ruling has become an issue of fact which can only be determined at the trial. I am satisfied that there is here a serious question to be tried.

The next serious issue that has to be determined at the trial arises only in the event it has been decided that the motion (to refer to the Ministry for a ruling on whether the manufacturing licence would be infringed by the contracts) was unanimously carried; that is to say, after the trial Judge has found that Mr. Moffett had agreed to the motion. Would Dunlop Malaysia be bound by the ruling of the Ministry then? A great deal would depend on what transpired after the meeting. On the day after the meeting, the Chairman of the board wrote this letter to the Ministry of Trade and Industry:

24 Disember 1982

Ketua Setiausaha
Kementerian Perdagangan & Perindustrian
Blok 10, Komplek Pejabat-Pejabat Kerajaan
Jalan Duta
Kuala Lumpur.

U.P. Encik Burkhan Abdullah

Tuan,

Re: Industrial Co-ordination Act - Manufacturing Licence

I believe that my letter of 15 December 1982 addressed to you has gone astray. This letter serves as a replacement. IT International is a joint venture between MARDEC (14.3%), Lembaga Tabung Angkatan Tentera (15.3%), Koperasi Polis (7.7%), Kedah State Development Corporation (5.1%), Pernas-Sime Darby Holdings (26.9%) and Dunlop Malaysia Industries Berhad (30.7%). In September and October 1982 Koperasi Polis, MARDEC and Lembaga Tabung Angkatan Tentera offered to sell their shares in accordance with the terms of the joint venture agreement. MARDEC and Koperasi Polis have since received acceptances from DMIB and PSDH. PSDH, however, have sought to purchase the entire shares offered.

At the Board meeting of IT International yesterday, reference was made to condition (c) of the ICA Manufacturing Licence issued to ITI. The condition referred to states:

(c) Sekurang-kurangnya 79% dari saham-saham syarikat ini hendaklah dibeli dan dipegang oleh warganegara Malaysia termasuk sekurang-kurangnya 65% dikhaskan, dan syarikat ini hendaklah berunding dengan Kementerian Perdagangan & Perindustrian sebelum pembahagian saham-saham yang dikhaskan itu dilakukan.

The Board resolved that if the Ministry of Trade & Industry ruled that this condition will be breached by DMIB exercising its right of pre-emption under the joint venture agreement, then the DMIB's acceptance of the offer of shares from the Koperasi Polis and other shareholders be considered null and void. Action could then be taken by the shareholders to sell their shares to PSDH. The Board also felt it necessary to draw the attention of the Ministry to the possible new equity ownership that may arise with the possible takeover of DMIB by Pegi.

In these circumstances I would like to seek the Ministry's views as to how the matter stands at present in the context of the ICA Manufacturing Licence condition (c). The Board would be grateful for a clear answer to the following:

(a) Can DMIB at present acquire the shares under offer without breaching condition (c) under ICA Manufacturing Licence?

(b) Can PSDH acquire all the shares under offer without causing any problem to the ICA Manufacturing Licence?

As the offer for sale has been made and acceptance received, with the transaction to be completed within a period of 100 days, I shall be grateful for an early answer to resolve the present impasse.

Yang benar,
Sgd.
(Tan Sri (Dr.) B.C. Sekhar)
Chairman
IT International Sdn. Bhd.

I pause here to observe that this letter did not draw the attention of the Ministry to clause 1.5.1.2 of the joint venture agreement. It is the first proviso of this clause that is very material and it says:

PROVIDED THAT if there is more than one Non-Selling Member each such Member shall have the right to purchase only that proportion of the shares proposed to be transferred as the number of shares then owned by it shall bear to the total number of shares owned by all of the Non-Selling Parties (including the Non-Selling Party concerned).

The letter could easily have created the wrong impression that it was either Dunlop Malaysia or Pernas-Sime Darby Holdings that could buy the shares offered. It was not made clear to the Ministry that both Dunlop Malaysia and Pernas-Sime Darby Holdings were entitled to buy the offered shares proportionately between themselves.

On 4 January 1983, the Ministry replied. A translation of the reply reads:

YB Tan Sri Dr. B.C. Sekhar
Chairman
IT: International Sdn. Bhd.
c/o Malaysia Rubber Research & Development Board,
P.O. Box 508
Kuala Lumpur

Dear Sir,

Industrial Co-ordination Act - Manufacturing Licence

I have been instructed to refer to your letter dated 24 December 1982 which requested the Ministry for its views on the following:

(a) Whether it is possible for DMIB at this point of time to acquire those shares in IT International offered by the other shareholders without infringing condition (c) of the Manufacturing Licence of the Company; and

(b) Whether it is possible for PSDH to acquire all the shares offered without infringing the Manufacturing Licence.

2. The Ministry wishes to draw your attention to the fact that among the conditions imposed on IT International was that 79% of the shares shall be held by Malaysians and at least 65% of which shall be held by Bumiputras. This means that any increase in the foreign shareholding of IT International without a proportionate increase in the holdings by Malaysians and Bumiputras would infringe condition (c) of the Manufacturing Licence. Therefore, any increase in the holding by DMIB, the majority of whose shares are held by foreigners, would infringe condition (c) of the Manufacturing Licence.

3. Regarding your second question, the Ministry wishes to draw your attention to the fact that PSDH, unlike DMIB, is a Company the majority of whose shares are held by Malaysians of which Bumiputras constitute the majority. Based on the foregoing, the Ministry is prepared to consider any application by PSDH to acquire all the shares held by MARDEC, Police Co-op and LTAT. The consequent reduction of the Malaysian and Bumiputra contents in the shares ownership of IT International arising from the acquisition by PSDH is still within accepted levels.

Thank you.

Yours obediently,
Sgd.
(Burkhan Abdullah)
Industrial Division
b/p Secretary-General
Ministry of Commerce & Industry

Now, if the ruling of the Ministry was based on a misapprehension of the facts and circumstances then the ruling would be misconceived and Dunlop Malaysia would not be bound by it. It is quite apparent in the Ministry's letter that the writer was unaware of Clause 1.5.1.2 of the joint venture agreement. It is also quite obvious that the letter did not take into account the possibility of a takeover of Dunlop Malaysia by Pegi Malaysia Berhad although this possibility was mentioned in IT International's letter to the Ministry. The Ministry in coming to their decision have also acted on the assumption that Dunlop Malaysia was foreign owned in the sense that the majority of its shares were held by foreigners. If it is possible for Dunlop Malaysia to show that the majority of Dunlop Malaysia's shares were not held by foreigners, then such an assumption would be an erroneous one.

The upshot of all this is that the ruling of the Ministry might not hold up to examination. It was made without regard to the possibility of Pegi stepping into Dunlop Malaysia, although they were apprised of this by the letter of the Chairman of IT International. It did not take into account Clause 1.5.1.2 of the joint venture agreement because their attention was not drawn to it by the chairman of IT International in his letter to the Ministry. They could be wrong for assuming that Dunlop Malaysia was foreign owned. I say this because according to Exhibit "H" Dunlop Malaysia claims to be 51.81% Malaysian controlled although this is disputed by the defendants. These are issues which could only be resolved at the trial.

If the Ministry had been aware of all the facts and the circumstances that I have just adverted to, would they have ruled as they did in their letter of 4 January 1983? They might not have. According to Exhibit "H", Pernas-Sime Darby Holdings is a Bumiputra controlled Malaysian company and Dunlop Malaysia is a Malaysian controlled company. What would be the status of Dunlop Malaysia if Pegi had come to acquire a substantial part of the shares of the company? Would that change the status of Dunlop Malaysia from Malaysian controlled to Bumiputra controlled? It is enough to say at this stage that those facts and circumstances were not brought to the attention of or considered by the Ministry when they gave their ruling. If the ruling was misconceived should Dunlop Malaysia be bound by it?

The next point that was urged for the defendants is that the contracts are not capable of being enforced because they would amount to circumventing the conditions of the licence and, therefore, be void for illegality. The short answer to this is to be found in the terms of the contracts themselves. It is to be remembered that all three contracts contained a condition that the sale of the offered shares is subject to approval being obtained from the relevant

Malaysian authorities. Until Dunlop Malaysia has been refused approval for the purchase of a proportionate part of the offered shares, it is premature at this stage to say that its intended acquisition of the shares would infringe the conditions of the manufacturing licence. There is nothing to prevent Dunlop Malaysia from meeting the requirement of the law by restructuring its equity.

In the result, I am satisfied that there is available before me sufficient material which discloses that Dunlop Malaysia has a claim that is not frivolous. I am satisfied that there is a serious question to be tried.

I am also satisfied that damages would not provide an adequate remedy for Dunlop Malaysia in the event of it succeeding at the trial. Its claim is based on three contracts which it would want to have enforced. If an injunction is not granted to Dunlop Malaysia it would stand to lose its proportion of the shares offered and possibly majority control of the company as well to Pernas-Sime Darby Holdings. On the other hand, the effect of an interlocutory injunction would merely postpone the date at which Pernas-Sime Darby Holdings could take the shares in the event of it succeeding at the trial. This is what Lord Diplock said in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 at 408 G:

> If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

As for the 2nd, 3rd and 4th defendants, as their Counsel, Mr Chan, had put it so candidly in his submission, they are not really concerned as to who should buy their shares. As for IT International the company could easily appoint new directors to replace those that have resigned. I am, therefore, satisfied that the balance of convenience lies in favour of granting the interlocutory injunction that is sought.

I am also satisfied that there was no suppression of facts. All material facts that would enable me to come to a decision were available before me.

Order for Interim Injunction

Before the Honourable Mr. Justice N.H. Chan

This 14th day of January 1983 In Chambers

Upon the application of the plaintiffs and upon reading the affidavit of Michael Moffett sworn and filed 14th day of January 1983 and upon hearing Humfrey Ball of Counsel for the plaintiffs and the plaintiffs by their said Counsel undertaking to abide by any Order the Court or a Judge may make as to damages in case the Court or a Judge should hereafter be of opinion that the defendants shall have sustained any by reason of this Order which the plaintiffs ought to pay IT IS ORDERED AND DIRECTED THAT THE DEFENDANTS PERNAS-SIME DARBY SDN. BHD., LEMBAGA TABUNG ANGKATAN TENTERA, KOPERASI POLIS DIRAJA MALAYSIA BERHAD, MALAYSIA RUBBER DEVELOPMENT CORPORATION BERHAD, IT INTERNATIONAL SENDIRIAN BERHAD, PERNAS SIME DARBY HOLDINGS SENDIRIAN BERHAD, by their directors, agents, servants or otherwise be restrained and an injunction is hereby granted restraining them from registering, sealing or issuing any share certificate or issuing publishing or doing any documents act or thing

or exercising any rights in furtherance of or pursuant to any transfers of shares in IT INTERNATIONAL SENDIRIAN BERHAD MADE BY LEMBAGA TABUNG ANGKATAN TENTERA, KOPERASI POLIS DIRAJA MALAYSIA BERHAD, MALAYSIA RUBBER DEVELOPMENT CORPORATION BERHAD on or about 5 January 1983 in favour of PERNAS-SIME DARBY HOLDINGS SDN. BHD. until after the hearing of a summons returnable on 26 January 1983.

Dated 14th day of January 1983.

Sgd: ...
ASSISTANT REGISTRAR
HIGH COURT
KUALA LUMPUR.

If you, the defendants adovenamed,

1. Pernas-Sime Darby Sdn. Bhd., 2. Lembaga Tabung Angkatan Tentera, 3. Koperasi Polis Di Raja Malaysia Berhad, 4. Malaysian Rubber Development Corporation Berhad, 5. IT International Sendirian Berhad, 6. Pernas Sime Darby Holdings Sendirian Berhad disobey this Order you Halim Dahlan a Director of the 5th and 6th defendants you will be liable to process of execution for the purpose of compelling the said IT International Sdn. Berhad and Pernas Sime Darby Holdings Sdn. Berhad to obey the same.

This Order is taken on behalf of the abovenamed plaintiffs by Humfrey Ball, Advocate & Solicitor, whose place of business and address for service is No. 48A, Jalan Bukit Bintang, Kuala Lumpur (Tel: 484357).

ORDER

Before The Honourable Mr. Justice N.H. Chan

This 12th day of March 1983 In Chambers

This Application coming up for hearing on 5th, 7th, 8th and 9th days of February 1983 in the presence of Mr. Humfrey Ball of Counsel for the plaintiffs, Mr. C.V. Das of Counsel for the First & Sixth defendants, Mr. Chan Hua Eng of Counsel for the Second, Third & Fourth defendants and Mr. K.K. Sng of Counsel for the Fifth defendant **AND UPON READING** the Summons-in-Chambers dated the 21th day of January 1983 and the two (2) Affidavits of Michael Moffett sworn on the 14th day of January 1983 and the 3rd day of February 1983, the Affidavit of Halim Dahlan affirmed on 24th day of January 1983, and the Affidavit of Tan Sri B.C. Sekhar affirmed on 24th day of January 1983 and all filed herein **IT WAS ORDERED** that this Application do stand adjourned for Judgment **AND** the same coming on for judgment this day in the presence of Mr. Humfrey Ball of Counsel for the plaintiffs, Mr. C.V. Das of Counsel for the First and Sixth defendants, and Mr. Chan Hua Eng of Counsel for the Second, Third & Fourth defendants and Mr. K.K. Sng of Counsel for the Fifth defendant **IT WAS ORDERED** that the Order for Interim Injunction (annexed herewith and marked "A") granted by this Honourable Court on 14 January 1983 be and is hereby extended until after the trial of this action against the same parties or further order **AND IT IS ALSO ORDERED** that a Certificate be and is hereby issued pursuant to s. 68(2) of the Courts of Judicature Act 1964 that no further arguments is required **AND IT IS LASTLY ORDERED** that the costs of this application be costs in the cause.

Dated this 12th day of March 1983.

Senior Assistant Registrar,
High Court Kuala Lumpur.

DRAFT ORDER for your approval please,

Sgd:
SHOOK LIN & BOK

1. Sgd:
HUMFREY BALL

2. Sgd:
SHEARN DELAMARE & CO.

3. Sgd:
SNG & MATTHEW.

Also found at [1983] 2 CLJ 87